tion in the State courts. These points will be discussed fully in the argument.

The petition should also be denied because (1) the decision of the State court is not final, and (2) petitioners are seeking a single writ to review decisions in twenty-three cases.

1. The Decision of the State Court Is Not Final.

Each of the twenty-three judgments of the California Supreme Court in the twenty-three cases seeking a refund of alleged discriminatory taxes provides that the judgment of the trial court in favor of the plaintiff is reversed with directions to the trial court to proceed in accordance with the views expressed in the opinion. (R. 331, 439-441). Such directed proceedings involve the taking of evidence to determine the amount of damage suffered. (R. 330.) Such directed proceedings have not yet been had. Since as to each of the twenty-three cases, "only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this Court." *Collins v. Miller,* 252 U. S. 364, 371.

A judgment to be final must be the final word of a final court and not be subject to review or correction in any other state tribunal. *Market Street Railway Co. v. Railroad Commission,* 324 U. S. 548, 551; *Laclede Gas Light Co. v. Public Service Com.,* 304 U. S. 398, 399-400; *Davis v. Crouch,* 94 U. S. 514, 517; Urie *v. Thompson,* 337 U. S. 163, 172-173; *Louisiana Nav. Co. v. Oyster Com.,* 226 U. S. 99, 102; *Great Western Tel. v. Burnham,* 162 U. S. 339, 345. Even though the

State Supreme Court has made definite rulings on Federal questions, if the judgment provides for further discretionary action by a lower state tribunal (as here where new values are to be determined based on evidence of value) such a judgment does not meet the test of finality *California National Bank v. Stateler,* 171 U. S. 447, 449; *Sand Springs Home v. Naharkey,* 299 U. S. 588. It is not sufficient that the major issue be determined. It must be a final determination of the controversy, both factually and legally. *Republic Natural Gas Company v. Oklahoma,* 334 U. S. 62, 67-68; *Bruce v. Tobin,* 245 U. S. 18, 19; *Mississippi Central Railroad Company v. Smith,* 295 U. S. 718; *Martinez v. International Banking Corp.,* 220 U. S. 214, 223.

To demonstrate that the proceedings yet to be had in the trial court are not merely ministerial, we shall devote the next three paragraphs to a discussion of the case and what still remains to be done.

The assessments involved are building assessments shown on the tax roll under the heading "Improvements" and opposite the description of the land upon which they are located. (R. 58.) In valuing the various buildings, the Los Angeles County Assessor from 1941 to 1946 valued petitioners' buildings including the enhanced value resulting from the presence of fixtures (R. 90-91), which in California are real property and part of the improvements for the purpose of taxation. Secs., 104 and 105, California Revenue and Taxation Code, derived from former Sec. 3617, California Political Code, enacted 1872; *San Diego Trust & Savings Bank v. San Diego,* 16 Cal. 2d 142, 105 Pac. 2d

94 [1940], certiorari denied 312 U. S. 679; *Trabue Pittman Corp. v. Los Angeles,* 29 Cal. 2d 385, 175 Pac. 2d 512 [1946]. In valuing other buildings the Assessor, during the same years, did not include the value of the fixtures but instead assessed them separately as personal property. (R. 69-70.) Personal property in California is taxed at the same rates and proportion of value as real property but is not subject to special assessment levies. (R. 322.) Thus the buildings of all were properly on the roll, properly described as "improvements", and properly assessed as real property, but because of the difference in such valuation practice such other buildings escaped special assessment levies on the small fixtures value of the property. This is the misclassification found by the State courts and referred to in the petition. This resulted in the following:

Taxes* paid by petitioners	Taxes paid by others
A. On land. (Not in dispute in this litigation.)	
1. County taxes	1. County taxes
2. City taxes	2. City taxes
3. School District taxes	3. School District taxes
4. Special assessments	4. Special assessments
B. On the structure portion of the building.	
5. County taxes	5. County taxes
6. City taxes	6. City taxes
7. School District taxes	7. School District taxes
8. Special assessments	8. Special assessments
C. On the fixture portion of the building.	
9. County taxes	9. County taxes
10. City Taxes	10. City Taxes
11. School District taxes	11. School District taxes
12. Special assessments	

*Pursuant to statutory authorization, in Los Angeles County the taxes and special assessments of the separate entities involved herein are all collected at the same time by County officers.

Thus, the petitioners and the others were subject alike to the first eleven items, but the others escaped the twelfth item. While the amount of the discrimination is comparatively nominal (being only a part of the total rate (R. 128) and applied to only a portion of the building value), the State Supreme Court nevertheless gave full recognition to the State and Federal Constitutions and Federal laws and remanded all twenty-three cases with directions to have the valuation on the twelfth item determined by the County Board of Equalization, and to have the trial court order the refund of such special assessments to petitioners. (R. 330.) Petitioners are not satisfied with such equal treatment, but without waiting for the completion of proceedings in the State courts which will bring it about, seek to have the matter reviewed by this Court in an effort to obtain a refund not only of item 12 but also of items 5 to 11. This result, it will be observed, would go further than to correct the found inequality; it would itself create a new and unconstitutional discrimination against all other taxpayers.

If the State courts are not prevented by this Court from completing the proceedings, all taxpayers will be treated the same with respect to local tax burden and no discrimination in fact will remain. At the conclusion of proceedings in the State court it may be that the petitioners will be satisfied with the amount of the award, or that new and different Federal questions will be presented. The decision, therefore, does not have the finality essential to confer jurisdiction on this

Court. *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62 at 68; *Kimball v. Evans,* 93 U. S. 321.

2. Petitioners are Improperly Seeking a Single Writ to Review Twenty-three Separate Cases.

In petitioning for a single writ of certiorari, petitioners overlook what is obvious upon the face of the record—that there are twenty-three separate and distinct cases herein involved.*

"Such proceedings are palpably irregular;" *Brown v. Spofford,* 95 U. S. 474 at 485.

Our objection goes not to the use of a single petition and single record but to application for a single writ to bring before the Court twenty-three cases presenting questions not common to all. There are five bank-plaintiff cases and eighteen landlord-plaintiff cases, each group involving different issues. They were not consolidated as in *First National Bank v. Louisiana Tax Commission,* 289 U. S. 60 at 62, and hence are reviewable, if at all, only by separate proceedings in certiorari. In this brief we state the questions separately and discuss them separately in the argument.

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*The facts demonstrating this to be true are:
(1) There are separate complaints, pleadings, and docket numbers in the trial court (R. 1, 32, 138); (2) they were tried as separate cases (except that in each of the six years the Simms and Gribble cases were consolidated for trial only); (3) a separate judgment was rendered in each case (except for the pairs of Simms and Gribble cases noted above) (R. 114, 220, 232, 234, 238, 241, 243, 246, 248, 251, 253, 256, 257, 260, 262, 264, 267); (4) a separate notice of appeal was filed in each case (R. 117, 138); (5) each case received a separate docket number on appeal (R. 138, 231); (6) a separate clerk's transcript on appeal was filed in each case (R. 138, 231); (7) the State Supreme Court's opinion bears the title and docket number of each separate case, and states that the "judgments" in the cases are reversed, etc. (R. 317, 330, 331); and (8) a separate remittitur was issued in each case (R. 439-441).

QUESTIONS PRESENTED

The questions herein involved, when properly classified as to the respective cases, are:

1. In the five cases in which the bank was plaintiff in the State court and is petitioner here:

> Where petitioner's building including fixtures is properly classified and correctly taxed, do errors in the classification of fixtures in other buildings which do not result in any lesser tax burden, constitute discrimination prohibited by either the Equal Protection Clause or paragraph 3 of R. S. 5219?

2. In the eighteen cases in which the bank was located in a building owned by a nonbank landlord and such landlord was plaintiff in the State court and is petitioner here:

> Where petitioner's building including fixtures is properly classified and correctly taxed, do errors in the classification of fixtures in other buildings which do not result in any lesser tax burden, constitute discrimination prohibited by the Equal Protection Clause?

3. In all twenty-three cases:

> Where the State law permits the taxing entities to reassess and again collect the legally valid portion of taxes refunded by order of court, does it violate the Due Process Clause for the State court to hold in accordance with State practice and prior State decisions that a setoff of such valid portion of the challenged taxes may and shall be

made in the initial refund proceedings and only the invalid portion of the tax be refunded?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; Rev. Stats., sec. 5219 (12 U. S. C. 548); sections 104, 105, 2188, 2188.2 and 5141, California Revenue and Taxation Code; sections 4a, 27 and 30, Bank and Corporation Franchise Tax Act, Calif. Stats. 1929, p. 19, 3 Deering's General Laws, Act 8488.

STATEMENT

Petitioners seek review of decisions of the California Supreme Court which adjudged certain real property taxes to be discriminatory and violative of R. S. 5219 or the Equal Protection Clause, or both, even though such taxes conformed to and were valid under State law. (R. 326.) The decisions sought to be reviewed, moreover, awarded to petitioners full relief from such discrimination by ordering refund to them of the entire found discriminatory portion of their otherwise valid taxes. (R. 330.) The petitioners attempt to reverse judgments which awarded to petitioners the full relief to which they are entitled, and which will thus produce complete equality of tax treatment as between petitioners and all other taxpayers.

The found discrimination involved correct classification and assessment as part of the building ("improvements") or real property during the tax years 1941 through 1946 of vault doors and counterlines installed in buildings used for banking purposes. (R. 326.) Question was raised because comparable trade fixtures in buildings other than those occupied by banks were generally misclassified and assessed as personal property. (R. 318-319.) Petitioners' taxes, taken by themselves, were completely valid and in conformity with R. S. 5219 and the Equal Protection Clause. It was the trade fixtures of such *other* property owners which were misclassified. However, except for special assessments, levied upon real property only, personal property was taxed at the same rate and proportion of value as real property. (R. 322.) Hence, the misclassification of trade fixtures of others merely resulted in such other taxpayers escaping part of their special assessments. The special assessment rate was but a fraction of the total rate (R. 128), and the misclassified fixtures constituted only a minor portion of the total real property. The State Supreme Court ordered such discrimination corrected by reduction of petitioners' special assessments to the level necessary to accord to them the full benefits of the misclassification enjoyed by such other taxpayers. (R. 330.)

In addition to special assessments, petitioner landlords' buildings, unlike those of other landlords, were subject to general taxes based upon an assessed value which included their bank tenants' properly classified

trade fixtures. Comparable but misclassified fixtures in other rented buildings were not included in the building assessments but were assessed as personal property to the tenant. Recovery of general taxes upon the value of the included fixtures was denied petitioner landlords for want of proof that such practice imposed on them a discriminatory tax burden. (R. 324.)

Petitioner bank also claimed damage through increase in a State imposed tax on bank franchises (not imposed or collected by respondents), the rate of which was under statute computed on the basis of the amount of local personal property taxes paid by non-banking corporations. (R. 323.) Relief on this ground was denied petitioner bank, not only because under State statute the State rather than the County should be sued for alleged illegal taxes collected by the State, but also for want of proof that the general misclassification of trade fixtures as personal property had resulted in a discriminatory tax burden. (R. 323-324, 326.)

ARGUMENT

I.

In Each of the Five Actions Brought By Petitioner National Bank, The Decision Involved No Substantial or Important Federal Question With Reference to R. S. 5219 or The Equal Protection Clause and is Based Upon Adequate Independent State Grounds.

The basis of the petition is the theory that petitioners' taxes were erroneous and void. However, these cases do not involve an illegal tax, but involve the question of reducing a legal tax so as to give full effect to the overriding constitutional and Federal statutory requirements of equality and uniformity.

Petitioner bank proceeds from the premise that R. S. 5219 constitutes a conditional grant of power to tax the real property of national banks (Pet., pp. 12-13), and the premise that the equality of treatment enjoined by R. S. 5219 and the Equal Protection Clause requires equal classification rather than equal tax burden (Pet., pp. 12-13), and draws the conclusion that it is entitled to refund of all taxes on the entire building. Since prior decisions of this Court demonstrate the fallacy of both premises of the argument, the asserted Federal question is unsubstantial; and since local assessment practice in Los Angeles County since 1946 has conformed to the statutory statewide practice, the question is also unimportant. Relief having been directed to be awarded to the full amount of the only damages suffered, the decisions below rest upon adequate independent State grounds.

1. No Substantial Federal Question Is Raised.

These cases involve only a local deviation from a long established statewide rule that fixtures are improvements and hence taxable as real property. California Revenue and Taxation Code, secs. 104 and 105, derived from former California Political Code sec. 3617(3), enacted 1872; *San Diego Trust & Sav. Bank v. San Diego,* 16 Cal. 2d 142, 105 Pac. 2d 94 (certiorari denied, 312 U. S. 679); *Trabue Pittman Corp. v. County of Los Angeles,* 29 Cal. 2d 385, 393, 175 Pac. 2d 512, 518. Because of such erroneous local deviation with respect to other property, petitioner bank argues that the County was without power under R. S. 5219 to tax the subject property and that such taxes were wholly void. While the first paragraphs of R. S. 5219 are a grant of power, the power to tax the real property of banks has always existed (*McCulloch v. Maryland,* 4 Wheat. [17 U. S.] 316 at 436), and the third paragraph of R. S. 5219 is carefully worded to preserve rather than grant such power.

This Court has consistently held that errors in value or rate of tax do not destroy the "power" to tax but that such errors go only to the amount of the tax which may be legally collected or retained. The uniformity and equal treatment required by the Equal Protection Clause relate to equality of tax burden. Only to the extent that the tax burden is excessive are the taxes refundable. In *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441 at 446, this Court said:

". . . This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

In *Central State Bank v. Bennett,* 284 U. S. 239 at 247, this Court said:

". . . The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. . . ."

Hillsborough Township v. Cromwell, 326 U. S. 620, is but an extreme application of the same principle. There the other property escaped taxation altogether and so, in order to bring the subject property down to the same level, it was necessary to reduce the taxes on the subject property to zero.

The above three cases arose under the Equal Protection Clause. The same general rule has been applied to taxes levied under R. S. 5219. *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa Des Moines Nat. Bank v. Bennett,* 284 U. S. 239; *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373;

Stanley v. Board of Supervisors, 121 U. S. 535; *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272.

In the last cited case the same contention was made as here that the irregularities and illegal method followed rendered the subject tax "void" and beyond the power of the taxing authorities. This Court rejected such contention, saying:

> "We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, . . . Where, however, there is a statute which provides for an assessment, and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid . . . the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, . . . This is the equitable rule, and it is good morals as well. . . ." (191 U. S. at 281.)

The above quotation demonstrates that the reason for the rule is not peculiar to any particular paragraph of R. S. 5219 but is the same general rule applied in the first three cases decided under the Equal Protection Clause. Moreover, since the above cases apply the general rule to taxes under the first paragraph of R. S. 5219 which is a grant of power, *a fortiori* the general

rule is applicable to cases under the third paragraph, which merely preserves a power that has always existed.

The foregoing eight cases are in sharp contrast with, and must be distinguished from, certain other cases where the tax in question was wholly unauthorized. *Owensboro Natl. Bank v. Owensboro,* 173 U. S. 664; *First Natl. Bank of Gulfport v. Adams,* 258 U. S. 362.

In the latter situation the tax, being wholly unauthorized and void, cannot be saved by any doctrine of "tax equivalency". In the former situation the subject tax, being authorized, need be reduced only to the extent necessary to remove the discrimination and make the taxes equal those of the most favored taxpayers.

Petitioners cite no cases of this Court to the contrary and we have found none. To support their contention that there is only a limited power to tax under R. S. 5219 and that any irregularity or illegality in the tax makes it utterly void, they cite only *People v. Feitner,* 167 N. Y. 1 at 8, 60 N. E. 265 at 268; *Hamilton National Bank v. District of Columbia,* 176 Fed. 2d 624; *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613 at 616, 130 Pac. 2d 9, 16-17.

None of the cases is in point. The first case merely holds that since a seat on the stock exchange was not taxable at all it could not be taxed to a nonresident under a statute permitting non-residents to be taxed only "to the same extent as if they were residents of

the state." The second case does not decide the amount of refund required. The third case actually decided the very limited question of State law, that real property could not be taxed to a tenant. In the last two paragraphs of the opinion the Oregon court expressly states that it is not passing upon the propriety of assessing fixtures as real property to the landlord (which was the assessment here).

The many cases of this Court are entirely consistent and determine the question in this case. *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441 at 446; *Central State Bank v. Bennett,* 284 U. S. 239 at 247; *Hillsborough Township v. Cromwell,* 326 U. S. 620; *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa-Des Moines Nat. Bank v. Bennett,* 284 U. S. 239; *N. Y. ex rel. Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373; *Stanley v. Board of Supervisors,* 121 U. S. 535; *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272.

2. No Important Question Is Raised.

The tax classification practice herein involved is merely a local problem, which existed in the County of Los Angeles only for the limited period from 1941 through 1946. For several years prior to 1941 petitioner bank actually received a tax advantage many times greater than the tax disadvantage herein complained of, for its vault doors and fixtures were then misclassified as personal property and treated as exempt. (R. 318.) Thereby it received the gratuitious

windfall of total tax escape, whereas other comparable fixtures similarly misclassified were not exempt but were subjected to all general taxes. Subsequent to 1946, the general countywide misclassification practice has been corrected by the County Assessor as declared in a companion case involving the 1947 taxes. *Security-First National Bank v. Board of Supervisors,* 35 Advance California Reports 351; 217 Pac. 2d 948. Petitioners have not sought review of this decision. Thus, petitioner bank has retained its escaped taxes for years prior to 1941; is made whole for the tax years herein involved, 1941-1946; and the question for years subsequent to 1946 has become moot. The questions urged are plainly unimportant.

3. The Decisions Were Based Upon Adequate Independent State Grounds.

The State Supreme Court ruled with, not against, petitioner bank. Discrimination forbidden by R. S. 5219 and the Equal Protection Clause was recognized, and full relief to petitioner was ordered by judgments directing refund to petitioner of the full amount of its damage resulting from special assessments, the amount to be determined in subsequent proceedings. (R. 330.)

Petitioner bank's assertion of damage by alleged increase of the State imposed bank franchise tax was rejected by the California Supreme Court for failure of proof. (R. 323-324, 326.) This was based upon the trial court's express refusal to find damage "because of the lack of sufficient evidence." (Finding XLI, R.

211.) Thus petitioners' assertion that there was rate increase and damage is not supported by the record. This Court has held that the one alleging discrimination has the burden of proving damage. *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373 at 392-393.

Petitioner's claim of damage under the State imposed bank franchise tax was denied on the further ground that any such damage is recoverable only by action against the State, which imposes and collects the tax. Such remedy and the procedure therefor is provided by the statute itself (Secs. 27 and 30, Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, 3 Deerings' General Laws, Act 8488) and, in fact, is being pursued by petitioner bank.* Thus, even if there were any damage, completion of this exclusive remedy provided by State law would completely remove it. No Federal question is presented by the mode of relief given by State law so long as an adequate mode is provided. The rule that in considering problems of discrimination all State laws and the acts of all officers are to be considered goes no further than that and does not authorize suing the State for a county obligation or the county for a State obligation.

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*The printed record therefor appears at R. 106 in No. 362, but was inadvertently omitted in this case. In the typewritten Reporter's Transcript it is Vol. 20, pp. 5504-5. It is printed in Appendix B to this Brief.

II.

In Each of the Eighteen Actions Brought by Landlords of National Banks, The Decision Involves No Important Federal Question With Reference to the Equal Protection Clause, But Was Decided Upon Adequate Independent State Grounds.

Petitioner landlords have no standing to assert protection of paragraph 3 of R. S. 5219, because such rights are not personal to these claimants. *Henderson & Calloway v. Tennessee,* 10 How. [51 U. S.] 311; *Long & Watson v. Converse,* 91 U. S. 105; *Missouri v. Andreano,* 138 U. S. 496; *Tyler v. Judges of Court of Registration,* 179 U. S. 405; *Albright v. New Mexico,* 200 U. S. 9. Their claim is limited to the Equal Protection Clause.

The claimed denial of equal protection is based upon the conceded fact that the landlords of the subject properties paid taxes on valuations which were enhanced by fixtures, whereas other landlords paid taxes on building valuations not so enhanced. With respect to the differential in amount of tax (i.e., the special assessment levies) this has been ordered corrected by the court below and no new question is presented here different from that discussed in the last point. With respect to the difference in assessee (i.e., landlord or tenant) recovery was denied by the State court because of no proof of damage.

1. No Important Federal Question Is Raised.

The problem of who is the proper assessee involves no question of tax escape. As the California Supreme Court correctly observed, "the complaint is not concerned with the comparative tax on the various properties, but solely with the question of whether the taxes will be paid by the landlord or his tenant." (R. 324.)

The State practice in this regard has been changed and is now controlled by Section 2188.2 of the California Revenue and Taxation Code (Stats. 1947, ch. 782), reading:

> "Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvements or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee."

By the statutory procedure thus afforded this problem is avoided in the future. A decision on the point favorable to petitioners thus would not be of general interest or importance.

2. The Decisions Were Based Upon Adequate, Independent State Grounds.

Denial of recovery of general taxes in each of the eighteen cases under discussion was predicated upon the absence of any showing of damage. (R. 324.) This Court has held that the one alleging discrimina-

tion has the burden of proving damage. *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373 at 392-393.

The statement in the opinion below (R. 324), that petitioner landlords may have protected themselves by contract against increased taxes due to their tenants' fixtures, is factually supported by the record. In accordance with usual ad valorem tax practice *(United States v. County of Allegheny,* 322 U. S. 174, 184), such taxes do not constitute a personal obligation, but by State law are *in rem* and impose a lien on the taxed property. California Revenue and Taxation Code, Sec. 2188. Thus, it is significant that the leases contained either a covenant by the tenant to reimburse the landlord for increased taxes or a covenant to keep the premises free and clear of liens or encumbrances created by acts or omissions of the tenant. (R. 65, 83.) Not only have petitioners failed to sustain their burden of proving damage, but the logical inference from the found facts is that there was no damage.

In contending that the possibility of contractual escape from the tax burden is not a sufficient State ground of decision, petitioners unavailingly rely on *United States v. County of Allegheny,* 322 U. S. 174. That decision correctly held that a tax on federally owned machinery, which was wholly exempt, could not be justified on the theory that its incidence was on a bailee of the machinery.

The subject property herein, of course, was fully and legally taxable at all times. Even had national

bank fixtures been misclassified like other fixtures, such fixtures would not thereby have become "exempt", in the sense of lack of power to tax, but would merely have been accorded an "unwarranted exemption" (R. 322) in the sense of a gratuitous escape from taxes to which they were legally subject. To shift the burden of such authorized taxes by contract is not to evade a legal immunity, as in the Allegheny County case.

III.

In Each of the Twenty-Three Cases The Federal Question With Reference to the Due Process Clause Was Not Timely Raised, and the Decision Was Based Upon Adequate Independent State Grounds.

Petitioners concede (Pet., pp. 13, 19) that State law reserves to the taxing entities power to reassess and collect again the legally valid portion of any taxes refunded by order of court. (California Revenue and Taxation Code, Secs. 4946-4948.) They complain, nevertheless, that application to them of a state rule of procedure permitting retention of the valid portion of the paid taxes in the initial refunding proceedings violates the requirements of Due Process. And they complain further that such rule is a "policy" rule declared for the first time in the decision sought to be reviewed. Both complaints are without merit. The California rule is based upon equitable principles repeatedly approved by this Court and is a rule of long standing in California. It should have been anticipated by peti-

tioners, and consequently the contention that it violated Due Process was not timely raised on petition for rehearing.

1. The Decisions Were Based Upon Adequate Independent State Grounds.

A long line of California decisions and the applicable State statute require application to petitioners of the equitable principle withholding refund of the valid portion of the tax. In California tax refunds are governed by equitable principles. *Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746; *Otis v. Los Angeles,* 9 Cal. 2d 366, 70 Pac. 2d 633; *Third & Broadway Bldg. Co., v. Los Angeles,* 220 Cal. 660, 32 Pac. 2d 377; *First Trust & Sav. Bank of Pasadena v. Los Angeles,* 206 Cal. 240, 273 Pac. 1066; *Steele v. San Luis Obispo County,* 152 Cal. 785, 93 Pac. 1020; *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696; *Esterbrook v. O'Brien,* 98 Cal. 671, 33 Pac. 765; *De-Fremery v. Austin,* 53 Cal. 380; *Bank of Mendocino v. Chalfant,* 51 Cal. 369.

Thus taxes paid upon assessments which are irregular or invalid will not be refunded if the property is in fact taxable and the whole amount is equitably due. *First Trust & Sav. Bank of Pasadena v. Los Angeles,* 206 Cal. 240, 273 Pac. 1066.

Where part only is invalid there may be division and refund of the invalid portion only, whether the invalidity relates to part of an assessment (*Third & Broadway Bldg. Co. v. Los Angeles,* 220 Cal. 660, 32

Pac. 2d 377; *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696) or part of a tax. *Otis v. Los Angeles,* 9 Cal. 2d 366, 70 Pac. 2d 633; *DeFremery v. Austin,* 53 Cal. 380. Also, it is established in California that the taxes and special assessments of different entities are entirely separate and distinct. *Loew's, Inc. v. Byram,* 11 Cal. 2d 746, 82 Pac. 2d 1.

Corrections which cannot be made by the courts may be made by the Board of Equalization (*Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746) acting as a quasi judicial body, exercising judicial functions. *McClelland v. Board of Supervisors,* 30 Cal. 2d 124 at 129, 180 Pac. 2d 676; *Los Angeles Gas & Electric Co. v. Los Angeles,* 162 Cal. 164 at 169, 121 Pac 384.

Section 5141, California Revenue and Taxation Code, is legislative recognition of the equitable principle established by this long line of decisions.* It recognizes that part of a tax or part of an assessment may be void and the rest valid. It provides for a refund of the invalid portion only and for interest thereon. This long established State procedure followed by the court below made it unnecessary for the Court to discuss State laws relative to reassessment.

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*Section 5141, California Revenue and Taxation Code:

"If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs."

Such California rule is in complete harmony with the decisions of this Court which have repeatedly approved the equitable rule requiring payment or tender of valid taxes as a condition precedent to attacking an invalid portion. *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272; *Albuquerque Nat. Bank v. Perea,* 147 U. S. 87; *Stanley v. Board of Supervisors,* 121 U. S. 535; *German Nat. Bank of Chicago v. Kimball,* 103 U. S. 732; *State Railroad Tax Cases,* 92 U. S. 575. The California rule that corrections which cannot be made by a court may be made by a board of equalization (*Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746) is consistent with the different functions of such bodies, recognized by this Court in *Stanley v. Board of Supervisors,* 121 U. S. 535 at 549-550. Because of such rule, not presented in *Santa Clara County v. Southern Pac. R. Co.,* 118 U. S. 394, and *California v. Central R. R. Co.,* 127 U. S 1 (cases relied upon by petitioner) the latter cases are not here in point. Furthermore, neither case lays down any Federal rule prohibiting segregation of valid and invalid taxes if permitted by State law, and both cases recognize that where segregation can be made, segregation should be made.

2. The Question Was Not Timely Raised.

Deprivation of Due Process was admittedly urged for the first time on petition for rehearing. In view of the foregoing statute and decisions the conclusion reached by the State Supreme Court could reasonably have been anticipated and should have been antici-

pated. Hence, this is in no sense a "surprise" case within the rule of *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 677-678, but is governed by *Herndon v. Georgia,* 295 U. S. 441, 443-444, and *American Surety Co. v. Baldwin,* 287 U. S. 156, 162.

CONCLUSION

WHEREFORE, it is submitted that the writ of certiorari prayed for should be denied.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel,
A. Curtis Smith, Assistant County Counsel,
Gordon Boller, Deputy County Counsel,
Arvo Van Alstyne, Deputy County Counsel,
County of Los Angeles
Attorneys for Respondents.

Of Counsel:

Louis A. Babior, Deputy City Attorney

H. H. MacDonald, Deputy City Attorney
City of Los Angeles.

APPENDIX A

1. Excerpt from R. S. 5219

Paragraph 3 of the above statute reads, as follows:

> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

2. Excerpts from California Revenue and Taxation Code

Section 104: "Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

Section 105: "Improvements" includes:

(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age.

(The foregoing sections are derived from former section 3617 of the California Political Code, enacted 1872, reading as follows:

Whenever the terms mentioned in this section are employed in this Title, they are employed in the senses hereafter affixed to them.

First—The term "real estate," includes:

1. The ownership of, claim to, possessions of, or right to the possession of land;

2. All mines, minerals, and quarries in and under the land, and all rights and privileges appertaining thereto:

3. Improvements.

Second—The term "improvements" includes:

1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land;

2. All fruit, nut bearing, or ornamental trees and vines not of natural growth.

Third—The term "personal property" includes everything which is the subject of ownership not included within the meaning of the term "real estate."

Fourth—The term "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.)

Section 2188: Every tax on improvements is a lien on the taxable land on which they are located, whether they are assessed to the landowner or to some other person.

Section 2188.2: Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvments or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee.

Section 3003: Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs.

Section 5141: If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs.

3. Excerpts from Bank and Corporation Franchise Tax Act of California.

Sec. 4a. The rate of tax on national banking associations and other banks and financial corporations mentioned in Sections 1, 2, and 4 of this act, shall be a percentage equal to the percentage of the total amount of net income, allocable to this State, of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilites Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this State as franchise taxes according to or measured by such net income, and required to be paid to this State or its political subdivisions by such corporations as personal property taxes during the preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 8 percentum. The percentage of the net income of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilities Act, required to be paid to this State or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 4 percentum thereof, bears to the total amount of net income of such corporation, allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to

California the personal property taxes required to be paid by such corporation to this State or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.

The commissioner, after public hearing and opportunity given to examine the data on which his determination is based, shall determine not later than the thirty-first day of December of each year the average percentage of net income above specified, and, within thirty days after his determination, shall mail notice of his determination and the amount of tax payable on the basis of such determination to all banks and financial corporations affected thereby, which are then classified on his records as banks or financial corporations, but such determination shall not be considered a deficiency assessment within the meaning of Section 25 hereof. The data gathered by the commissioner in determining the rate, referred to herein, shall be made available to the taxpayers affected by such determination at the time and in the manner prescribed by regulations adopted by the commissioner.

If it be judicially determined that the rate of tax on any bank or corporation is higher than is authorized by law such bank or corporation shall be relieved of liability for any tax imposed by this act only to the extent of the excess beyond that legally authorized. (Statutes of 1933, p. 871, as amended.)

Sec. 27. (a) If, in the opinion of the commissioner, or the State Board of Equalization, as the case may be, there has been an overpayment of tax, penalty or interest by a taxpayer for any year for any reason, the amount of such overpayment shall be credited against any taxes then due from the taxpayer under this act, and the balance shall be refunded to the taxpayer or its successor through reorganization, merger, or consolidation, or to stockholders upon dissolution. No such credit or refund shall be allowed or made until approved by the State Board of Control. No such credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of such period a claim therefor is filed by the taxpayer, or unless before the expiration of such period the commissioner has certified the overpayment to the State Board of Control for approval of the refunding or the crediting thereof. If (a), the taxpayer has, within the period prescribed in the preceding sentence, agreed in writing, under the provisions of Section 25, to extend the time within which the commissioner may propose an additional assessment, or (b) if the taxpayer has agreed with the United States Commissioner of Internal Revenue for an extension (or renewals thereof) of the period of proposing and assessing deficiencies in federal income tax for any year, the period within which a claim for credit or refund may be filed, or credit or refund allowed or made

if no claim is filed, shall be the period within which the commissioner may make an assessment under such circumstances, except that the provisions of the preceding sentence shall apply to any claim filed, or credit or refund allowed or made, before the execution of such agreements. Insofar as the claim for credit or refund relates to an overpayment on account of the deductibility under Section 8 (e) of a debt as one which became worthless, or an erroneous inclusion of an amount attributable to the recovery of a bad debt, prior tax or delinquency amount under Section 6 (b) (4), due to an adjustment of a bad debt deduction under Section 8 (e), in lieu of the period of limitation prescribed in the second preceding sentence, the period shall be seven years from the date prescribed by law for filing the return for the year with respect to which the claim is made. A refund claim upon which action has become final shall not thereafter be considered a refund claim within the meaning of the foregoing provision except to the extent allowed. Every claim for refund must state the specific grounds upon which the claim is founded.

(b) If the commissioner disallows any claim for refund, he shall notify the taxpayer accordingly. At the expiration of 90 days from the mailing of such notice, the commissioner's action upon the claim shall be final unless within such 90-day period, the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. If the commissioner fails to mail notice of action on any refund claim with-

in six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and appeal to said board. Appeals must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination. Such determination shall be final upon the expiration of 30 days from the time of such determination unless within such 30-day period the taxpayer or the commissioner files a petition for rehearing with said board, in which event the board's determination shall not become final until the expiration of 30 days from the time the board issues its opinion on said petition.

(c) (1) Interest shall be allowed and paid upon any overpayment in respect of any tax at the rate of 6 percentum per annum as follows:

(A) In the case of a credit, from the date of the overpayment to the date of the allowance of the credit. Any interest allowed on any credit shall first be credited on any taxes due from the taxpayer under this act.

(B) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the commissioner.

(2) (A) If the commissioner disallows interest on any claim for refund, he shall notify the taxpayer accordingly. At the expiration of 90 days from the mailing of such notice, the commissioner's action upon the disallowance of such interest shall be final unless within such 90-day period, the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. Appeals must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination. Such determination shall be final upon the expiration of 30 days from the time of such determination unless within such 30-day period the taxpayer or the commissioner files a petition for rehearing with said board, in which event the board's determination shall not become final until the expiration of 30 days from the time the board issues its opinion on said petition.

(B) Within 90 days after the mailing of the notice of the commissioner's action disallowing interest upon any refund claim, or in the case of an appeal to the State Board of Equalization from the disallowance of interest on any refund claim, within 90 days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth for interest in such claim for the recovery of the interest.

If the commissioner fails to mail notice of action of disallowance of interest on any refund claim within six months after the interest was claimed, the taxpayer may, prior to mailing of notice of action of disallowance of interest on the refund claim, consider the interest disallowed and bring an action against the commissioner on the grounds set forth for interest in such claim for the recovery of the interest.

(3) A payment not made incident to a bonafide and orderly discharge of an actual liability or one reasonably assumed to be imposed by law, is not an overpayment for the purposes of this subsection and interest is not payable thereon.

(4) If a credit or refund of any part of an overpayment would be barred under Section 27 (a), except for the seven-year limitation therein relating to bad debts, no interest shall be allowed or paid with respect to such part of the overpayment for any period beginning after the expiration of the period of limitation provided in Section 27 (a), other than the seven-year limitation therein relating to bad debts, for filing claim for credit or refund of such part of the overpayment and ending at the expiration of six months after the date on which the claim was filed or, in case no claim was filed and the overpayment was found by the board, ending at the time the appeal was filed with the board.

(d) Any refund or any portion thereof which is erroneously made, and any credit or any portion there-

of which is erroneously allowed, may be recovered, together with interest at the rate of 6 percentum per annum from the date the refund was made or the credit allowed, in an action brought by the commissioner in a court of competent jurisdiction in the County of Sacramento in the name of the people of the State of California, and such actions shall be tried in the County of Sacramento, unless the court, with the consent of the Attorney General or the counsel for the commissioner, orders a change in place of trial. The Attorney General or the counsel for the commissioner must prosecute such action, and the provisions of the Code of Civil Procedure, relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.

In the event that a tax has been illegally levied against a taxpayer, the commissioner shall set forth on his records the reasons therefor and thereafter shall authorize the cancellation of such tax.

(e) If, after filing a protest or an appeal to the State Board of Equalization, pursuant to Section 25, a taxpayer pays the tax protested, before the commissioner acts upon the protest or the board on the appeal, the commissioner or the board shall treat the protest or the appeal as a claim for refund or an appeal from the denial of a claim for refund filed under this section. (Statutes 1929, p. 31, as amended.)

Sec. 30. (a) No injunction or writ or mandate or other legal or equitable process shall issue in any suit,

action or proceeding in any court against this State or against any officer thereof to prevent or enjoin the assessment or collection of any tax under this act but any taxpayer claiming that the tax computed and levied against it pursuant to Section 24.1 and 25 of this act is void in whole or in part may bring an action against the commissioner for the recovery of the whole or any part of the amount paid. Such action must be filed within four years from the last date prescribed for filing the return or within one year from the date the tax was paid, whichever period expires the later; provided, that no action shall be filed for the recovery of a deficiency assessment unless the taxpayer has made protest to the commissioner of the computation and levy complained of under the provisions of Section 25 hereof or unless the taxpayer has filed a claim for refund for the tax in question, under the provisions of Section 27.

(b) Within 90 days after the mailing of the notice of the commissioner's action upon any refund claim, or in case of an appeal to the State Board of Equalization from the disallowance of any refund claim, within 90 days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment.

If the commissioner fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment.

(c) Whenever under the provisions of this section an action is commenced against the commissioner, a copy of the complaint and the summons must be served upon the commissioner or assistant commissioner. A second copy of the complaint and summons must be furnished to the commissioner, but this requirement shall not be considered jurisdictional. At the time the commissioner demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento, which demand must be granted. The Attorney General or the counsel for the commissioner must defend the action. The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. A failure to begin such action within the time herein specified shall be a bar against the recovery of such taxes. In any such action the courts shall have power to render judgment for plaintiff for any part or portion of the tax, interest, penalties or cost found to be void and so paid by plaintiff upon such assessment.

(d) In all actions now pending against the State Treasurer under the provisions of this act, the commissioner shall be substituted for the State Treasurer by the court wherein the action is pending. This substitution shall not in any way affect the rights of the plaintiff in said action.

(e) If judgment is rendered against the commissioner, amount thereof shall first be credited against any taxes and interest due from the taxpayer under this act and the remainder refunded to the taxpayer or its successor by the State Treasurer on warrant drawn by the Controller.

(f) In any judgment of any court rendered for any overpayment in respect of any tax imposed by this act, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the commissioner. (Statutes of 1929, p. 31, as amended.)

APPENDIX B

Excerpt from Reporter's Transcript, Vol. 20, pp. 5504-5.

The Court: What is the status of the litigation in regard to 4A?

Mr. Nelson: The status is this, your Honor: several cases have been filed through the years and are lying there under stipulation. A few months ago a complaint was filed by Bank of America challenging the validity of the taxes levied in 1942, measured by the net income of 1941, which invokes this question. The complaint has been served and the state has pleaded to it by demurrer and motion that we would expect. It has not yet been argued, so it has just reached the demurrer stage.

The Court: Where was it filed?

Mr. Nelson: We filed it in the Superior Court at Sacramento, which is the jurisdiction unless the Commisisoner consents to some other.

FILED
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No. 362

IN THE

SUPREME COURT

OF THE

United States

October Term, 1950

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),
Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and City of Vernon, a municipal corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

HAROLD W. KENNEDY,
County Counsel,
A. Curtis Smith,
Assistant County Counsel,
Gordon Boller
Deputy County Counsel,
Arvo Van Alstyne
Deputy County Counsel,
County of Los Angeles,
Attorneys for Respondents.

OF COUNSEL:
Louis A. Babior,
Deputy City Attorney,
H. H. MacDonald,
Deputy City Attorney,
City of Los Angeles.

WESTERN PRINTING COMPANY, WHITTIER

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In the
Supreme Court of the United States
October Term, 1950

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association), *Petitioner,* vs. COUNTY OF LOS ANGELES, a body corporate and politic; and City of Vernon, a municipal corporation, *Respondents.*	No. 362

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

OPINION BELOW

The opinion of the Supreme Court of the State of California herein (R. 124) is reported in 35 Advance California Reports 348, 217 P. 2d 946. No opinion was rendered on denial of rehearing. (R. 177.)

JURISDICTION

The petition herein invokes the jurisdiction of this Court under 28 U. S. C. 1257 (3) and 2101 (c). Those provisions do not afford jurisdiction, for the reason

that the decision of the Supreme Court of California did not pass upon the validity of any statute, and, except for one claimed Federal right unseasonably raised by petition for rehearing, there was not drawn in question by the decision any Federal right, title, privilege, or immunity.

In the Supreme Court of California, petitioner did assert Federal questions similar to those involved in the twenty-three companion cases decided on the same day (R. 127-141) (*Simms, et al., v. County of Los Angeles,* 35 Advance California Reports 332, 217 P. 2d 936). Such questions so raised, however, were not passed on or decided. Instead, the decision was based upon the adequate non-Federal ground that recovery was barred for failure of petitioner to exhaust its available administrative remedies. (R. 126.) Petitioner's contention herein that this ground of decision constituted a denial of Due Process of law was admittedly urged for the first time in petition for rehearing in the California Supreme Court. (Pet. 17.) Such rule of exhaustion of remedies is in complete accord with long-settled California law, and its application to bar relief herein should have been anticipated, and in fact was anticipated, by petitioner, prior to decision. The asserted denial of Due Process thus came too late to afford jurisdiction of this Court; and in any event, such claim is so demonstrably devoid of merit as to negative the existence of a substantial federal question.

QUESTION PRESENTED

Although the facts giving rise to this action were basically the same as in certain companion cases wherein also petitioner was plaintiff (*Security-First National Bank v. County of Los Angeles,* California Supreme Court docket numbers L. A. 20967, 20971, 20975, 20979, and 20983, 35 Advance Cal. Rep. 332, 217 P. 2d 936 (R. 127-141)), the ground of decision was entirely different. Accordingly, the sole question, but not timely raised,* is:

1. May a state court, consistently with the Due Process Clause, refuse judgment for recovery of taxes upon property discriminatorily overvalued in violation of R. S. 5219 and the Equal Protection Clause, upon the ground of found failure of the taxpayer to pursue the available and adequate remedy for equalization of such assessment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States; Rev. Stats., sec. 5219 (12 U. S. C. 548); and sections 104, 105, 1605, 1607, and 1611 of the California Revenue and Taxation Code.

*This jurisdictional defect will be discussed in the second point of the Argument herein.

STATEMENT OF THE CASE

Petitioner national bank brought this action to recover 1941 taxes paid under protest upon a building owned and occupied by it for banking purposes (R. 1), the assessment of which was overvalued as compared with other building assessments in Los Angeles County. (R. 48-49.) Petitioner did not apply to the County Board of Equalization for equalization of its assessment prior to institution of the refund action. (R. 78, 124.) The California Supreme Court held that petitioner was thereby precluded from maintaining the action. (R. 124.)

The disproportionate valuation of petitioner's building assessment resulted from the fact that in 1941 certain fixtures owned by petitioner and installed in the banking premises of its building, were classified as improvements and included in the valuation placed upon petitioner's building assessment. (R. 48.) It was held in the twenty-three companion cases (*Simms, et al., v. County of Los Angeles,* 35 Advance California Reports 332, 337-338, 217 P. 2d 936) (R. 130, 131), that such classification of such property was correct and in strict accordance with the statutes and decisions of California. However, contrary to State law (R. 130), the assessor in Los Angeles County, in arriving at the values of other buildings, failed to consider the enhancement in value resulting from fixtures but assessed them separately as personal property. (R. 49.) Although the buildings of all were properly entered on the assess-

ment roll, described as "improvements" and assessed as real property (R. 19, 48, 49), such differences in valuation practice resulted in petitioner's building assessment being valued higher than the other undervalued building assessments in the county. (R. 48.) Other nonbank property owners, however, were taxed upon all personal property (including such fixtures misclassified as personal property) at the same rates and proportion of value as upon real property, except for special assessments which were levied on real property only. (R. 132.) As a result, petitioner's building bore a discriminatory tax *burden* only as to a portion of the special assessment levies thereon which the buildings of other property owners escaped due to misclassification of their fixtures as personalty. (R. 137.)

ARGUMENT

A basic fallacy underlies the petition. Its premise is that petitioner's fixtures were "exempt" from State taxation, and that application to the Board of Equalization was thus unnecessary under settled State practice. Such fixtures, however, were not exempt. They were improvements and thus taxable real property.

Petitioner's right to relief was based on overvaluation of its taxable property, and under state law in such cases, application for reduction of the overvalued assessment by the Board of Equalization is prerequisite to relief in the courts. Such is the long and well-established state rule of procedure in California. As-

serted denial of Due Process in applying it to bar relief herein was not seasonably urged, and does not constitute a substantial question.

I.

The Judgment Below Is Based Upon An Adequate Independent State Ground, To Wit, The Failure To Pursue The Available Administrative Remedy.

The decision of the Supreme Court of California herein is expressly based solely upon petitioner's found failure (R. 60, 124) to pursue the available prerequisite statutory remedy, to wit, application to the county board of equalization for reduction of the assertedly erroneous assessment. (R. 124-126.) It is purely a decision of State law which does not raise any Federal question. *Mellon Co. v. McCafferty,* 239 U. S. 134, 136; *Northern Pacific Railroad Co. v. Patterson,* 154 U. S. 130, 134; *Hammerstrom v. Troy Nat. Bank of Sioux City, Iowa,* 81 F. 2d 628, 636, certiorari denied 299 U. S. 546. See also, *First National Bank of Greeley v. Board of County Commissioners of the County of Weld,* 264 U. S. 450, 454-456; *Gorham Manufacturing Co. v. State Tax Commission,* 266 U. S. 265, 269-270; *McGregor v. Hogan,* 263 U. S. 234, 238; *Stanley v. Board of Supervisors,* 121 U. S. 535, 552.

1. Petitioner's Property Was Not Under Federal Law Exempt From Taxation, and Petitioner Was Thus Not Excused From Seeking Administrative Relief.

Contrary to the uniform decisions of this Court cited above, petitioner contends that application of the doctrine of exhaustion of remedies herein infringed upon Federally assured rights. Petitioner notices the settled state-law exception, recognized in the decision below (R. 124) that such doctrine is inapplicable where the property assessed is either "exempt" or "outside the jurisdiction" of the County, and asserts that under R. S. 5219 and the Equal Protection clause, its vault doors and counterlines were necessarily "exempt" and "outside the jurisdiction" as a matter of federal law.

The right of equal tax treatment may require invalidation of State tax action to the extent that it does not conform thereto; but Federal invalidity of a tax because of discriminatory treatment does not "exempt" the taxpayer or his property from, nor destroy the State's inherent power (*McCulloch v. Maryland,* 4 Wheat. [17 U. S.] 316, 436) to impose, nondiscriminatory taxes upon real property. Indeed, petitioner concedes that jurisdiction to reassess would exist with respect to the valid portion of any taxes on the subject property ordered refunded herein. (Pet., p. 10; California Revenue & Taxation Code, secs. 4946-4948.) Cases upon which petitioner relies, *Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 446; and *Iowa-Des*

Moines National Bank v. Bennett, 284 U. S. 239, 247, do not support its claim of exemption. Those cases hold that tax discrimination forbidden by R. S. 5219 or the Equal Protection Clause may be cured either by lowering the plaintiff's tax to the level of the most favored taxpayer, or by raising the taxes of the favored taxpayers to the same level as his, provided plaintiff is not limited to initiating the latter remedy.

The cited cases, and other decisions of this Court (*Tradesmen's Natl. Bank v. Okla. Tax Commission,* 309 U. S. 560; *N. Y. ex rel. Amoskeag Sav. Bank v. Purdy,* 231 U S. 373; *Peo. Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272; *Stanley v Board of Supervisors,* 121 U S. 535) have established the uniform settled principle that irregular or illegal taxing procedures do not make taxable property "exempt" from taxation; and that such taxes are not "void," but are merely voidable to the extent that they are illegal. Such cases are in sharp contrast with, and must be distinguished from, cases like *Owensboro National Bank v. Owensboro,* 173 U. S. 664, and *First National Bank of Gulfport v. Adams,* 258 U. S. 362, in which the subject taxes were wholly unauthorized, and hence voidable to their full extent. In such circumstances only may the subject property be said to be "exempt" from the tax involved. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, cited by petitioner, is merely an illustration of the latter rule.

2. Petitioner's Property Was Not Under State Law Exempt From Taxation, and Petitioner Was Thus Not Excused From Seeking Administrative Relief.

The distinction observed in the Federal cases is recognized and followed by the California decisions. "Exempt" property within the meaning of the exception to the general rule of exhaustion of remedies before the Board of Equalization, is property which "is not taxable at all" or which is "not liable to assessment at all." *Brenner v. Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397 (1911). See also, *Kern River Co. v. County of Los Angeles,* 164 Cal. 751, 755, 130 Pac. 714 (1913). Cf. *Los Angeles Shipbuilding & Dry Dock Corp. v. Los Angeles County,* 22 Cal. App. 2d 418, 422, 71 P. 2d 282 (1937). Since petitioner's fixtures were improvements and real property under settled California law (California Revenue & Taxation Code, secs. 104-105, derived from California Political Code, sec. 3617 (enacted 1872); *San Diego Trust & Sav. Bank v. County of San Diego,* 16 Cal. 2d 142, 105 P. 2d 94 (1940), certiorari denied 312 U. S. 679; *Trabue Pittman Corp. v. County of Los Angeles,* 29 Cal. 2d 385, 175 P. 2d 512 (1947)) and were admittedly located within the county, city and district in which they were assessed (R. 1, 2), they were clearly taxable by respondents herein. (R. 125.)

Manifestly, if petitioner's fixtures had been misclassified like other fixtures, they would not thereby have become "exempt" in the sense of lack of power to tax, but would merely have been accorded what the California Supreme Court termed an "unwarranted

exemption" (R. 133) in the sense of a gratuitous escape from taxes to which they were legally subject. (R. 125.) Such interpretation is conclusive on this Court and no more raises any Federal question than did the decision involved in *First National Bank of Greeley v. Board of County Commissioners of the County of Weld,* 264 U. S. 450, 453, where like failure to comply with a state requirement to exhaust available remedies was held to preclude judicial consideration of a claim of tax invalidity based, as here, upon R. S. 5219 and the Due Process and Equal Protection Clauses. Squarely in point, also, is the statement of Mr. Justice Fuller in *Northern Pacific Railroad Co. v. Patterson,* 154 U. S. 130, 133-134:

> "It is contended, on the other hand, that where taxes are levied upon property which is by law exempt from taxation, the statutory remedy by application to a board of review is only cumulative and that the taxpayer may at his election seek his remedy by injunction in the first instance. But it was for the supreme court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration."

If petitioner misunderstood the California law and mistakenly considered its fixtures to be exempt personal property and considered that resort to the Board was thus not prerequisite to judicial relief, petitioner was not thereby excused from making timely applica-

tion to the Board. As Mr. Justice Brandeis observed in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51,

> " . . . The long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted . . . has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

See also *St. Louis-San Francisco Ry. Co. v. Alabama Public Serv. Com.*, 279 U. S. 560, 562-563; *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 174; *Dalton Adding Mach. v. State Corp. Com.*, 236 U. S. 699, 701.

3. Application to the Board of Equalization Was Not Excused Upon the Ground of Futility.

Petitioner seeks reversal of the California Court on the theory that denial of relief by the Board of Equalization in the twenty-three companion cases is a conclusive showing that such application would have been futile. The argument quite misconceives the decisions in *Montana National Bank v. Yellowstone County*, 276 U. S. 499; *Hills v. Exchange Bank*, 105 U. S. 319, and *Whitbeck v. Mercantile Bank*, 127 U. S. 193, upon which it relies. Those cases are distinguishable, in that therein application to a local board was rendered legally futile by prior judicial decisions or exist-

ing statute law declaring such board to be wanting in jurisdiction to consider such applications. The distinction lies in the difference between futility in the legal sense of lack of power to grant relief, and futility in the practical sense of mere anticipated failure to obtain redress from a tribunal with power to grant it. In the former case, application for relief is excused. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673; *Bernstein v. Smutz,* 83 Cal. App. 2d 108, 114-115, 188 P. 2d 48; *McPheeters v. Medical Examiners,* 82 Cal. App. 2d 709, 717, 187 P. 2d 116. In the latter case it is not excused. *U. S. v. Felt & Tarrant Mfg. Co.,* 283 U. S. 269, 272-273; *Highland Farms Dairy v. Agnew,* 300 U. S. 608, 616-617; *Lehon v. Atlanta,* 242 U. S. 53, 56; *Abelleira v. District Court of Appeal,* 17 Cal. 2d 280, 300-301, 109 P. 2d 942, 132 A. L. R. 715; *Red River Broadcasting Co. v. Federal Communications Com.,* **98 F. 2d 282, 288.**

Petitioner overlooks the principle long recognized by this Court (*Stanley v. Board of Supervisors,* 121 U. S. 535) that the Board of Equalization sits as a quasi-judicial body. *McClelland v. Board of Supervisors,* 30 Cal. 2d 124, 129, 180 P. 2d 676; *Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 356-357, 153 P. 2d 746. As such, the Board was the tribunal having exclusive original jurisdiction over all questions of fact bearing on valuation, and the Superior Court had no power to initially award relief. As Mr. Justice Field said in *Stanley v. Board of Supervisors,* 121 U. S. 535, 549:

"Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board."

4. Petitioner Did Not Apply for Relief to the Board of Equalization.

Asserted joinder by petitioner in the 1941 application to the Board filed by its landlords (R. 109, 121) was not compliance with the rule. Such application did not seek relief for petitioner or with respect to the subject property (R. 78, 109) and thus fails to satisfy the jurisdictional essential of a timely verified written application showing the facts claimed to require equalization as to the property herein involved. California Revenue & Taxation Code, sec. 1607; *Rittersbacher v. Board of Supervisors,* 220 Cal. 535, 32 P. 2d 185; *De Mille v. Los Angeles County,* 25 Cal. App. 2d 506, 77 P. 2d 905. Cf. *Merchants Trust Co. v. Hopkins,* 103 Cal. App. 473, 477, 284 Pac. 1072. Petitioner's contention is basically the untenable one that it may be excused for failure to sue within the statute of limitations because others did timely sue in cases involving the same legal issues.

5. California Procedure Does Not Require the Injured Taxpayer to Seek Relief by Upward Revision of the Taxes of Others.

Contrary to petitioner's contention, California equalization procedure does not burden an aggrieved taxpayer with the task of seeking upward revision of the taxes of other discriminatorily favored taxpayers. The California Revenue and Taxation Code contemplates equalization of assessments *either* by reducing the applicant's assessment, or by increasing the other assessments, but leaves the choice between the alternative remedies to the County Board of Equalization. (California Revenue and Taxation Code, secs. 1605, 1611.) As the opinion below indicates, equalization could have been achieved by the Board by entering the misclassified fixtures of others as improvements on the assessment roll, thereby increasing such other improvement assessments. (R. 126.) Also, as shown by the decisions in the twenty-three companion cases, equalization could have been achieved by reducing petitioner's building assessment by an amount equal to the value of the fixtures discriminatorily included. (R. 139, 140.)

Thus, California equalization procedure, unlike that involved in the cases which petitioner cites (*Hillsborough Township v. Cromwell,* 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247), requires the aggrieved taxpayer only to

seek equalization of his own assessment in quasi judicial proceedings before the Board of Equalization. The choice between two available procedures for achieving equalization is for the Board. If it does not revise upward the assessments of the discriminatorily favored taxpayers, by law it must reduce the assessments of the complainant. Any practical impossibility of securing relief due to the onerous burden thereof on the injured taxpayer, which is the basis of the rule invoked by petitioner (see *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 446) is wholly absent here, and no Federal question is raised.

II.

Petitioner's Claim of Denial of Due Process in Application To It of The Ground of Decision Below Was Not Timely Raised.

Petitioner concedes that the petition for rehearing was the first place petitioner complained that barring relief for failure to apply to the Board of Equalization constituted a denial of due process of law. (R. 166; Pet. p. 17.) Since rehearing was denied without opinion and by memorandum order only (R. 177), it cannot be assumed that the State court actually considered and passed on the point. *McCorquodale v. Texas,* 211 U. S. 432, 437; *Forbes v. State Council of Virginia,* 216 U. S. 396, 399; *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.,* 228 U. S. 326, 333-334. Accordingly, the claimed Federal due process question was raised too

late to permit review by this Court (*Herndon v. Georgia,* 295 U. S. 441, 443, and cases cited) unless petitioner can show that the decision herein caused "surprise," and that its petition for rehearing was thus the earliest opportunity at which the point could have been urged. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 678.

1. The State Rule Is Well-settled and Should Have Been Anticipated.

The ultimate question, with reference to timeliness, is "whether the ruling here assailed should have been anticipated." *Herndon v. Georgia,* 295 U. S. 441, 444. That the ruling should, indeed, have been anticipated is shown by the fact that the requirement to apply to the Board of Equalization for reduction of an overvalued assessment of taxable property has been in California law continuously since at least 1872, when the Political Code was first enacted (California Political Code sec. 3674, now California Revenue & Taxation Code, sec. 1607), and in case law since at least 1861, when *Fall v. Mayor of Marysville,* 19 Cal. 391 (reaffirmed in *Henne v. County of Los Angeles,* 129 Cal. 297, 61 Pac. 1081 (1900)) unequivocally declared such application necessary. See also, *California Domestic Water Co. v. Los Angeles,* 10 Cal. App. 185, 189, 101 Pac. 547 (1909). Although *Brenner v. City of Los Angeles,* 160 Cal. 72, 76, 116 Pac. 397, 399 (1911) pointed out an exception to the rule of the *Henne* case, namely, that prior appli-

cation to the Board was unnecessary in cases of assessment of non-taxable property, the basic requirement was expressly held applicable to discrimination cases in *Lace v. City of San Diego,* 198 Cal. 405, 406, 245 Pac. 196 (1926) in which the *Brenner* case was expressly distinguished. See also *Mahoney v. City of San Diego,* 198 Cal. 388, 245 Pac. 189 (1926); *Associated Oil Co. v. County of Orange,* 4 Cal. App. 2d 5, 8-11, 40 P. 2d 887 (1935); and *Dawson v. County of Los Angeles,* 15 Cal. 2d 77, 81, 98 P. 2d 495 (1940).

In view of these decisions, petitioner's contention that the ruling below could not have been anticipated amounts to a confession of error, that petitioner believed its fixtures to be personal property and thus tax-exempt property within the doctrine of *Brenner v. City of Los Angeles,* 160 Cal. 72, 116 Pac. 397. By California statute, however, fixtures have been classified as real property for tax purposes since at least 1872. (California Revenue & Taxation Code, secs. 104-105, derived from former California Political Code, sec. 3617, enacted 1872.) Any question on the point was conclusively settled by decision prior to the tax year in question (*San Diego Trust & Sav. Bank v. County of San Diego,* 16 Cal. 2d 142, 105 P. 2d 94 (1940), cert. den. 312 U. S. 679) and prior to the appeal herein (*Trabue Pittman Corp. v. Los Angeles,* 29 Cal. 2d 385, 175 P. 2d 512 (1946)). Petitioner clearly was bound to anticipate application of the state's well-settled procedural rule, and to present any Federally grounded ob-

jection thereto prior to the petition for rehearing *Herndon v. Georgia,* 295 U. S. 441, 443-444; *American Surety Co. v. Baldwin,* 287 U. S. 156, 162. Moreover, since petitioner's theory that its fixtures were exempt is not supported by any decided cases, petitioner "had to assume the risk that the ultimate interpretation by the highest court might differ from its own" (*Brinkerhoff-Faris Trust Co. v. Hill,* 281 U. S. 673, 682, footnote 9) and present its arguments thereon seasonably.

2. The State Rule Was in Fact Anticipated by Petitioner.

Petitioner not only should have anticipated the California rule, but petitioner's claim of "surprise" is squarely refuted by the record, which discloses the following facts demonstrating that applicability of the rule of exhaustion of remedies was in fact anticipated by petitioner:

(a) In 1941, counsel for petitioner bank presented other Board applications filed by its landlords with respect to similarly overvalued buildings other than the subject building. (R. 109, 121.)

(b) Petitioner filed Board applications in companion cases for years 1942-1946. (R. 128.)

(c) The rule of the California cases requiring application to the Board of Equalization under these circumstances was argued in the trial court. (R. 75-104.)

(d) The same rule was again argued in the Supreme Court of California. (Appellants' Opening Brief in California Supreme Court,* pp. 33-43.)

Factually, therefore, the instant case is entirely distinguishable from *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, wherein "the possibility of relief before the tax commissioner was not suggested by anyone in the entire litigation until the supreme court filed its opinion." Petitioner's failure to urge denial of Due Process prior to its petition for rehearing precludes review of that question by this court. *Herndon v. Georgia,* 295 U. S. 441, 443-444; *American Surety Co. v. Baldwin,* 287 U. S. 156, 162.

III.

No Substantial Federal Question Is Presented By The Petitioner

As we have previously shown, the only possible Federal question herein is petitioner's claimed denial of due process of law. This contention, we submit, is too slight and frivolous to warrant judicial consideration, and cannot be regarded as substantial. *Equitable Life Asso. Soc. v. Brown,* 187 U. S. 308; *Zucht v. King,* 260 U. S. 174; 20 Boston Univ. L. Rev. 501 (1940). As already demonstrated, the decision below constitutes mere application of a long-established and well-settled

*Copies of this brief have been filed with the Clerk of this Court.

procedural rule of law of California. Contrary to petitioner's assertion, the Court below did not overrule or modify the case of *Brenner v. City of Los Angeles,* 160 Cal. 72, 116 Pac. 397. On the contrary, the Court cited and relied upon the *Brenner* case as establishing the "exception . . . made when the attempted assessment is a nullity because the property is either tax-exempt or outside the jurisdiction" (R. 124), but held that such exception did not apply herein since the property was both taxable and within the jurisdiction. In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, controlling case law denied jurisdiction to the tax commission and such commission persistently refused to entertain applications for relief. The California decisions on the other hand squarely establish that proceedings before the Board of Equalization were at all times available to petitioner, and, as shown in the twenty-three companion cases, such filed applications were in fact considered by that body. (R. 128.) The claim of denial of due process is manifestly insubstantial.

CONCLUSION

WHEREFORE, it is submitted that the writ of certiorari prayed for should be denied.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel,
A. Curtis Smith, Assistant County Counsel,
Gordon Boller, Deputy County Counsel,
Arvo Van Alstyne, Deputy County Counsel,
County of Los Angeles
Attorneys for Respondents.

Of Counsel:

Louis A. Babior, Deputy City Attorney

H. H. MacDonald, Deputy City Attorney
City of Los Angeles.

APPENDIX

1. Excerpt from R. S. 5219.

Paragraph 3 of the above statute reads, as follows:

> 3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

2. Excerpts from California Revenue and Taxation Code

Section 104: "Real estate" or "real property" includes:

(a) The possession of, claim to, ownership of, or right to the possession of land.

(b) All mines, minerals, and quarries in the land, all standing timber whether or not belonging to the owner of the land, and all rights and privileges appertaining thereto.

(c) Improvements.

Section 105: "Improvements" includes:

(a) All buildings, structures, fixtures, and fences erected on or affixed to the land, except telephone and telegraph lines.

(b) All fruit, nut bearing, or ornamental trees and vines, not of natural growth, and not exempt from taxation, except date palms under eight years of age.

(The foregoing sections are derived from former Section 3617 of the California Political Code, enacted 1872, reading as follows:

Whenever the terms mentioned in this section are employed in this Title, they are employed in the senses hereafter affixed to them.

First—The term "real estate," includes:

1. The ownership of, claim to, possession of, or right to the possession of land;

2. All mines, minerals, and quarries in and under the land, and all rights and privileges appertaining thereto;

3. Improvements.

Second—The term "improvements" includes:

1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land;

2. All fruit, nut bearing, or ornamental trees and vines not of natural growth.

Third—The term "personal property" includes everything which is the subject of ownership not included within the meaning of the term "real estate."

Fourth—The term "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.)

Section 1605: After giving notice as prescribed by its rules, the county board may increase or lower any

assessment on the local roll in order to equalize the assessment of property on the local roll.

Section 1607: A reduction in an assessment on the local roll shall not be made unless the party affected or his agent makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction.

(The foregoing section was derived from the former Section 3674 of the California Political Code, enacted 1872, reading as follows:

No reduction must be made in the valuation of property, unless the party affected thereby or his agent makes and files with the Board a written application therefor, verified by his oath showing the facts upon which it is claimed such reduction should be made.)

Section 1611: After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

October Term, 1950.

No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITY OF VERNON, a municipal corporation,

Respondents.

REPLY TO RESPONDENTS' ANSWER

W. SUMNER HOLBROOK, JR.,
740 Rowan Building, Los Angeles 13,

EDMUND NELSON,
919 James Oviatt Building, Los Angeles 14,

Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles, Phone MA. 6-9171.

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In the Supreme Court of the United States

October Term, 1950.
No. 362

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a national banking association),

Petitioner,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic; and CITY OF VERNON, a municipal corporation,

Respondents.

REPLY TO RESPONDENTS' ANSWER.

Certain contentions made in Respondents' Answer require brief reply.

1. Decision of Court Below Barred Petitioner's Recovery Solely Because It Failed to Take Administrative Steps to Correct Erroneous Assessments of Others.

The Answer erroneously asserts (p. 6) that the decision below is expressly based upon Petitioner's found failure to pursue the claimed statutory remedy of "application to the County Board of Equalization for reduction of assertedly erroneous assessment." The court below stated that the nature of the administrative relief which it found Petitioner failed to exhaust was correction of assessments of "misclassified" fixtures owned by *others* erroneously assessed as *personal property*. It said [R. 126]:

> "In fact, the board of equalization could have eliminated the discrimination by directing the assessor to enter the misclassified fixtures owned by others as real property upon the assessment roll (Rev. & Tax. Code, §1611), in which case plaintiff would not be

> excused from paying, or entitled to recover, the special district taxes. Plaintiff's failure to make timely application for relief before the board precluded the adoption of that means of equalization."

Denial herein to Petitioner of its otherwise admitted right to recover in part, at least, discriminatorily levied taxes on national bank fixtures in violation of R. S. 5219 and the Fourteenth Amendment was wholly rested by the California Court upon Petitioner's failure to compel local taxing officials to assess correctly as improvements fixtures owned by other taxpayers[1] and thus remove the discrimination which is the foundation of Petitioner's claim of denial of its Federal rights. The decision below thus adopts in California the New Jersey administrative rule discussed and found federally insufficient in *Hillsborough Township v. Cromwell,* 326 U. S. 620. There the petitioning taxpayer had been taxed on intangibles in strict accord with valid state statute. However, because of general disregard of such statute, no other intangibles were taxed in the township. Such was held by this Court to constitute a denial of equal protection of the law under the Fourteenth Amendment irrespective of failure of the taxpayer administratively to seek taxation of the other intangibles. It said at page 623:

> "The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class."

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[1]This would have required administrative change for at least 31,000 larger taxpayers whose assessed valuation of trade fixtures, machinery and equipment, in large part held by the court to have been "improvements" for the purposes of taxation, amounted to 21% of their aggregate personal property assessments [R. 81].

This Court thereupon affirmed a declaratory judgment declaring Cromwell's assessment invalid and thus, in effect, exempted his intangibles from local taxation. To the same effect are: *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247.

2. Determination as to Whether This Case Presents a Situation of Exempt Property Is One of Federal Not State Law.

The Answer (pp. 7-11) erroneously asserts that whether or not this case falls under the "exception" to the state administrative rule pronounced by the court below, that application to the board of equalization need not be made if the property is "tax exempt" or "outside the jurisdiction," is a matter upon which the determination of the state court must control.

Such contention is contrary to the decision on similar facts in *Standard Oil Company of California v. Johnson,* 316 U. S. 481, 483. In that case this Court had before it for determination whether gasoline sold to army post exchanges in California fell within the provisions of Section 10 of the Motor Vehicle License Tax exempting "fuel sold to the Government of the United States or any department thereof for official use of said Government." The California Supreme Court had held that a post exchange was not an agency of the United States and, therefore, the sales were not "exempt." In holding such decision presented a question of Federal law upon which the state court's ruling was not controlling, this Court said at page 483:

> "If the court's construction of Section 10 of the Act had been based purely on local law, this construction would have been conclusive, and we should have to

> determine whether the statute so construed and applied is repugnant to the federal constitution. But in deciding that post exchanges were not 'the government of the United States or any department thereof,' the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law. . . . It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by Section 10, sales to post exchange were not exempted from the tax. Since this determination of a federal question was by a state court, we are not bound by it."

Similarly in this case the question, as to whether an asserted right of California to tax national bank fixtures as real property, when all other fixtures were held by it to have been classified as personal property, raises a question of "tax exempt" property or property "outside the jurisdiction" of California to tax within the exception to the state administrative rule requiring application to a board of equalization, is one of a Federal law reviewable by this Court irrespective of the state decision below.

3. California Procedure Does Not Permit a Board of Equalization to Separate an Improvement Assessment and Levy on Part Thereof Only General County and City Taxes While Levying on the Remainder Special Assessment Taxes as Well.

Under decisions of this Court (*supra*, pp. 1-2) a state cannot deny to a taxpayer recovery of taxes, invalid upon Federal grounds, simply because he did not take administrative steps to bring about upward revision of the assessments of other taxpayers. Such, however, was the express ground upon which the California court below

barred Petitioner's recovery herein. The Answer (pp. 14-15) attempts to avoid necessary consequences of this statement of position by contending (as was not done by the California Supreme Court) that *if* Petitioner had applied to the Board of Equalization for relief it could, "by reducing Petitioner's building assessment," have achieved "equalization" as ordered in the *Simms Case.*

Such assertion completely misconceives the nature of California equalization procedure. "Equalization," as the word implies, means to equalize *valuations* of taxable property already listed on the assessment roll by making them conform to true values. *People v. Dunn,* 59 C. 328 (1881). No question of *disproportionate valuation* is involved in this proceeding [R. 60]. "Equalization" in this sense is the *only* power granted by state constitution[2] or statute[3] to a board of equalization to review assessments.

By state statute *all* property assessed as "improvements" must carry *all* improvements taxes, including "special assessment taxes." Any reduced valuation of Petitioner's improvement assessment (to compensate for discriminatorily included bank fixtures) would necessarily carry all improvement taxes, including special assessment taxes. Reduction of valuation would not remove from the subject matter of the assessment the included bank fixtures; but to the extent the valuation was reduced all taxes, including general, city and county taxes, would be reduced.

But the gist of the decision in the court below was that both assessment of and taxes levied on Petitioner's building assessment, including the bank fixtures, were in strict accord with state statute.

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[2]Cal. Const. Art. XIII, Sec. 9. For text, see Pet., App. A, p. 2.
[3]R. & T. C., Sec. 1605, 1607. For text, see Ans., App. pp. 2-3.

Additional statutory authority (R. & T. C., Sec. 1611)[4] granted to the board only permits it, upon its own motion but after investigation, to order the *assessor* to cancel an assessment which, as made, renders "doubtful" collection of a tax later to be levied thereon. The board itself has *no direct power* to cancel, or separate, an assessment under any circumstances. Its attempt so to do would be a nullity. *People ex rel. Pacific Mail S. S. Co. v. Board of Supervisors,* 50 C. 282 (1875). On the contrary, action taken by an assessor pursuant to instructions under Section 1611 is merely to enter a new assessment as if originally and legally made by him in the first instance. Section 1611 is thus only one mode of instituting a re-assessment.

The California statute expressly provides machinery for a taxpayer to secure a reduction in *valuation* of his own assessment.[5] No procedure is given him to initiate a cancellation (or reassessment) proceeding by the assessor under Section 1611. Petitioner's right so to do was denied before the board by Respondents' counsel [R. 173-174], and is again denied in their Answer (p. 15).

The California Supreme Court in its decision herein was therefore correct in asserting that, under Section 1611, the *only* procedure by which Petitioner's building assessment including the bank fixtures (and all improvements taxes later levied thereon) could be sustained and Petitioner's federal rights to equal treatment be preserved, was for the Board to order re-assessments as to all other taxpayers whose fixtures had been "misclassified" as personal property. But, to require Petitioner to have taken administrative steps so to do, would have

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[4]For text, see Pet., App. A, p. 3.
[5]R. & T. C. Sec. 1607.

required it to have sought upward revision of the assessments of others, a burden which this Court has held a state can not impose upon a taxpayer in order to secure his federal rights.

Actually the tax result reached in the judgment ordered in the *Simms Case* could never have been accomplished administratively by a California assessor, board of equalization, or other official. It represents nothing more than the California court's view of "policy." Judgment as ordered therein provides for separation of each *improvement* assessment (without declaring it to be "void" and a nullity) and extends *personal property taxes* only against a *part* thereof (assumed to represent bank fixtures) and leaves subject to *all improvement taxes,* including special assessment taxes, the *remainder* of the *improvement* assessment. Such result is utterly impossible of administrative accomplishment under California statute.

The statutory rule that only improvement taxes shall be extended against improvement assessments, and only personal property taxes against personal property assessments, is one of the reasons for the requirement in the state judgment statute that the successful taxpayer thereunder shall recover judgment for *all* taxes collected upon a void assessment[6] and also for the provision in the reassessment statute[7] of authorization to public bodies, after such a judgment, to reassess, any part of the property which can subsequently be validly assessed under the same or different tax classification. Unconstitutional withholding of such statute-required judgment by the decision of the California Supreme Court constitutes the denial of due process of law complained of in the *Simms Case.*

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[6]R. & T. C. Sec. 5141. For text see Pet., App. A, p. 5.
[7]R. & T. C., Sec. 4946-4948. For text see Pet., pp. 5-7.

4. Petitioner Could Not Have Anticipated the New-Found Requirement of Application Before a Board of Equalization for Relief in a Case Where No Question of Overvaluation Was Claimed nor Have Raised Its Due Process Contention Before the Filing of Its Petition for Rehearing Before the California Supreme Court.

The Answer (pp. 15-20) concedes that a proper showing of denial of due process of law in violation of the Fourteenth Amendment has been made out by Petitioner herein under the rule of *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678, except that: (1) Petitioner should have known that it was required to make preliminary application to the Board of Equalization for correction of the erroneous assessments of others; and (2) that Petitioner, in raising its due process point for the first time on re-hearing before the State Supreme Court, lacked the "surprise" element required to make such initial raising of a federal question "timely."

The former state of California law, contradicting both contentions, is evidenced by decision of the District Court of Appeal rendered on January 17, 1950, in *City and County of San Francisco v. County of San Mateo,* 95 A. C. A. 699, 213 P. (2d) 505, when it said:

> "Questions of valuation are the only matters properly brought before a board of equalization, whether State or County (see Judicial Review of Determinations by County Boards of Equalization, by W. Sumner Holbrook, Jr., 14 So. Cal. L. Rev. 276, 277) and it is well settled that where the taxpayer complains of an overvaluation of his property he must first seek relief from the Board of Equalization before applying to the courts. . . .

"Since 1911, however, our courts have recognized that there is a distinction between 'the mere overvaluation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all.' Brenner v. Los Angeles, 160 Cal. 72, 76, 116 P. 397, 399; see, also, . . . While the courts have uniformly held that the administrative remedy must be pursued before recourse may be had to the courts in overvaluation cases, no such requirement exists in the case where exempt property has been assessed."

It was not until hearing was granted by the State Supreme Court therein, on March 16, 1950, long after this case had been submitted to the California Supreme Court, that there was any indication in California that preliminary application to a board of equalization was required in a case presenting no question of valuation.

Under such circumstances, Petitioner could not have anticipated the change of the thirty-nine-year rule of decision made in this case. Such *new* rule was retroactively applied to Petitioner under circumstances as to which Petitioner could not satisfy its requirements. Its adoption justifiably constituted a "surprise" to Petitioner. Presentation of Petitioner's new Federal injury for the first time on petition for rehearing in the court below was therefore timely. Under Respondents' own contentions, the Petition herein thus presents a case of denial of due process of law.

Respectfully submitted,

W. Sumner Holbrook, Jr.,
Edmund Nelson,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1950.
No. 361

W. J. SIMMS, WILLIAM S. ROSECRANS, EDWARD W. COST, CARRIE D. GRIBBLE, ZELLA Z. MCCOMB, MERCHANTS NATIONAL REALTY CORP., a corporation, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a body corporate and politic, and CITIES OF GARDENA, VERNON, MONTEREY PARK, and CLAREMONT, municipal corporations,

Respondents.

REPLY TO RESPONDENTS' ANSWER.

W. SUMNER HOLBROOK, JR.,
740 Rowan Building, Los Angeles 13,

EDMUND NELSON,
919 James Oviatt Building, Los Angeles 14,
Counsel for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Respondents.

REPLY TO RESPONDENTS' ANSWER.

Certain contentions made in Respondents' Answer require brief reply.

1. Judgment of State Court Below Is Final Under Judicial Code Section 237(a).

The Answer (pp. 2-5), in asserting that the Petition is "premature" because the judgment below is not "final", misconceives the rule of this Court as to what constitutes a "final" judgment within the meaning of Judicial Code, Section 237(a). In *Gospel Army v. City of Los Angeles*, 331 U. S. 543, 547 (1947), the rule is stated as follows:

> "Today 'the test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court. * * *' . . .